Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HARRY BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was harmless error for the Government to introduce evidence of the racist policy of an organization of which the defendant was president when the Government did not charge any racially-motivated offenses and therefore the highly prejudicial racist policy was without any evidentiary value.

2. Whether the structural error standard under *Arizona v. Fulminante* should have been applied when the district court improperly admitted the Government's evidence of the racist views of the defendant's organization, and the defendant therefore did not voir dire potential jurors about their ability to judge him fairly in spite of his association with this organization.

RULE 29.6 STATEMENT

All of the parties to the proceeding are included in the caption of this case. No corporate disclosure is required under Rule 29.6.

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IN THE
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No. 02-_____

HARRY BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Harry Bowman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 302 F.3d 1228 (11th Cir. 2002), and is reprinted at Appendix A. The order denying

Petitioner's request for a panel rehearing is reprinted at Appendix B.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 20, 2002. On October 10, 2002, Petitioner filed a timely request for panel rehearing. The petition for panel rehearing was denied by order dated December 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . .be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State."

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Pretrial Matters

Harry Bowman was the international president of the Outlaws Motorcycle Club from 1984 to 1997. In 1997, Mr. Bowman was indicted in the Middle District of Florida on ten counts. The Government did not charge him with any racially-motivated or hate crimes. Indeed, the wrongful conduct charged arose out of the Outlaws' ongoing feuds with other motorcycle clubs such as the Hell's Angels. Four

counts in the indictment alleged violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"). The overt acts associated with these counts included assault and conspiracy to murder. The remaining six counts in the indictment alleged drug offenses, destruction of a rival motorcycle organization's clubhouse and possession of a firearm as a felon.

In the introduction to Count One, the indictment stated that "[m]embership in the Outlaws Motorcycle Club was limited to white males." R1-1. Mr. Bowman objected pretrial to the inclusion of this statement. R1-47. He argued that the allegation of racism was irrelevant to the charges and was highly prejudicial. Id. During the hearing on this issue, the Government argued that the whites-only policy was support for its argument that the Outlaws was an "enterprise" under RICO. R7-40. Upon questioning the Government, however, the court discovered that none of the charges alleged conduct against African-Americans or other members of minority groups. R7-41. The court ultimately granted Mr. Bowman's motion to strike, stating:

> Well, assuming [the whites only requirement is] still a rule, even an unwritten rule, the question is why is it relevant if there is no crime against a black because of the rule? If your relevance is you need it to prove that there is an enterprise and this is part of the enterprise, you've got bylaws, you've got a hierarchy set up; you've got badges and indicia of membership. I just don't see how that particular element is relevant to any issue in this case *other than to just to try to inflame the jury.*

R7-41 (emphasis added); R7-43; R1-56 (written order).

During the pretrial hearing, while the court did not expressly forbid the Government from introducing during the trial the Outlaws' bylaws which included the whites-only policy, it did caution that it would entertain a relevance objection from the defense. if the Government sought to do so. R7-43-44.

Voir dire followed the pretrial evidentiary hearing. In light of the judge's pretrial order, defense counsel did not ask any questions concerning whether the potential jurors could judge a member of a group with racist opinions fairly and impartially. Defense counsel also permitted one African-American juror to be selected for the jury.

B. Evidence of the Outlaws' Racist Views Presented at Trial

During the trial, the Government repeatedly raised the Outlaws' racist policy throughout the trial. The Government's focus on this issue was not an isolated incident. The court admitted four separate documents during the trial that included this policy. These documents were published to the jury on an overhead projector, thus making the whites-only policy clearly visible to the jury. R10-177.

When the Government introduced the Outlaws' national constitution, Mr. Bowman objected and requested that, at a minimum, the first sentence – which included the whites-only policy – be redacted before being published to the jury. Defense counsel argued that there were not "any issues of race in this entire trial" and reminded the court of its pretrial ruling to strike similar language from the indictment. In a reversal from its pretrial ruling, however, the court permitted the introduction of the entire, unredacted document, explaining that "if it's a part of the constitution, it's a part of the constitution." Later in the trial, the Government introduced a copy of the Outlaws' national constitution seized at Mr. Bowman's house which included the whites-

only policy. Mr. Bowman again objected and requested redaction. R12-12. The Government objected to redaction of the constitution and stated that the Outlaws are a "racial organization." R12-12; *see also* R10-201 (introducing document that "members must be white"); R11-12-13 (introducing document that it is an "all white membership"). The court overruled the defendant's objections and admitted the unredacted documents.

Not only were the unredacted documents with the whites-only policy made a part of the record four separate times during the trial, but an FBI agent also called the jury's attention to the specific policy by testifying that the constitution "indicate[s] who can belong in the club." R10-177. Additionally, the Government called an FBI agent to testify as an expert on the Outlaws. When the defense objected to any testimony about the whites-only policy, the Government argued at sidebar that "it's a whites-only club. It is a racial organization." R12-145. Reversing itself yet another time, the court concluded that any expert testimony about the whites-only policy would have a prejudicial effect that outweighed its relevance, though the expert could testify about other matters. The court excluded the testimony of the whites-only policy, explaining that "right now there is nothing in this trial that I know of that would justify the prejudicial – overwhelming prejudicial nature of that one issue." R12-147.

In addition to the evidence about the whites-only policy, the Court admitted other evidence portraying the Outlaws as racists. First, over Mr. Bowman's objection, the Government introduced Nazi and Confederate flags seized at the Outlaws' clubhouse. R10-156. Second, the Government introduced evidence that some Outlaws wore "lightning bolts," which were Nazi-style "SS" tattoos. R14-90-92. Third, the Government introduced evidence that Mr.

Bowman had such a tattoo, in an attempt to link him to the racist views of the Outlaws. R14-92, R19-96-97, 161-64.

Mr. Bowman was convicted of eight of the counts in the indictment and was sentenced to life in prison.

II. DECISIONS BELOW

Mr. Bowman appealed his conviction to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291, raising three issues: (1) whether the evidence was sufficient to convict him; (2) whether the district court had abused its discretion in permitting an anonymous jury; and (3) whether the district court had abused its discretion under Rule 403 of the Federal Rules of Evidence in refusing to redact the whites-only policy in the Outlaws' constitution.

As to the third issue, the court agreed, reasoning that because Mr. Bowman "was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant to his guilt or innocence." *United States v. Bowman*, 302 F.3d 1228, 1239 (11th Cir. 2002). The court concluded that given the other evidence that the Outlaws was an "enterprise" under RICO, the whites-only policy was cumulative, and its probative value was "limited" and "outweighed by the danger of unfair prejudice." *Id.* at 1240. The Eleventh Circuit thus held that it was error for the district court to have permitted the "injection of racial issues" and that it should have redacted the policy. *Id.* The court nonetheless concluded that this was harmless error after comparing the impact of this evidence to the other evidence against Mr. Bowman. *Id.*

Mr. Bowman petitioned for panel rehearing on this issue. This petition was denied by the Eleventh Circuit on December 23, 2002.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW IGNORED ESTABLISHED PRECEDENT IN HOLDING THAT THE ADMISSION OF EVIDENCE OF THE RACIST VIEWS OF THE DEFENDANT WHEN HE IS NOT CHARGED WITH ANY RACIALLY-MOTIVATED CRIMES IS HARMLESS ERROR

The court below committed error by holding that it was harmless error to admit evidence of the Outlaws' racist policies even where no racially-motivated crimes were charged. Other courts of appeals have repeatedly held that even under the harmless error standard, it is reversible error to admit evidence that is so inflammatory and irrelevant that it taints the entire trial, particularly where the evidence seeks to inflame racial prejudice. Indeed, in order for Mr. Bowman's conviction to be affirmed, this error must be harmless "beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Plainly, the Government did not consider the evidence in question to be harmless. Throughout its presentation of the evidence in Mr. Bowman's trial, the Government sought every opportunity to remind the jury of the Outlaws' racist views. Indeed, this evidence was clearly an essential persuasive element of the Government's case against Mr. Bowman. The Government introduced documents showing the whites-only policy four separate times during the trial. It also offered evidence of the Nazi and Confederate flags found at the Outlaws' clubhouses and that some members, including Mr. Bowman, had Nazi-style tattoos. Furthermore, the Government's own explanation of the need for this evidence was that it would portray the Outlaws as a "racial organization." But the Government had not charged Mr. Bowman with any racially-motivated crimes and did not

introduce one shred of evidence that Mr. Bowman's personal views had anything to do with the charged offenses.

The Eleventh Circuit first correctly concluded that it was error for the district court to have admitted the whites-only policy under Rule 403 because this evidence was irrelevant to the charged crimes and would serve only to inflame the jury's passions against Mr. Bowman.

Rule 403 of the Federal Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The evidence about the Outlaws' racist views is relevant only if it had "any tendency to make the existence of any fact that is of consequence to the determination of the action" more or less probable. Fed. R. Evid. 401. As the Eleventh Circuit's opinion noted, because Mr. Bowman "was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant to his guilt or innocence." *Bowman*, 302 F.3d at 1239.

This conclusion is supported by the other Courts of Appeals which have consistently held that evidence of a defendant's racist views is irrelevant and should be excluded if racial animosity is not an element of the crime charged. *See, e.g., United States v. Magleby*, 241 F.3d 1306, 1319 (10th Cir. 2001) (holding that it was not error to admit testimony concerning racist song lyrics played by the defendant because it went to prove racial animus as required in cross-burning case); *United States v. Bonneau*, 970 F.2d 929, 934-35 (1st Cir. 1992) (holding that it was not

reversible error for the Government to introduce in a criminal tax evasion case a letter written to the IRS by the defendant that referred to the defendant's constitutional rights as a "free white male citizen" despite its racist "overtones" because it was relevant to an element of the offense); *United States v. McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992) (holding that in case where defendant was charged with using force to interfere with federal housing rights on the basis of race, it was not error to have admitted evidence including a Ku Klux Klan poster and a flashlight that was marked with a swastika and two lightning bolts because the evidence was "clearly relevant to establishing his racial hatred and that he acted on that hatred, *an element of the crime charged*.") (emphasis added); *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (permitting evidence relating to the defendant's attempt to join a skinhead group in a cross-burning case because the "skinhead evidence tended to establish [the defendant's] racial animus and that he might act on his beliefs"); *United States v. Silverstein*, 737 F.2d 864, 866 (10th Cir. 1984) (holding that evidence linking the defendant to the Aryan Brotherhood prison gang because it established the defendant's motive to kill another prisoner who refused to follow the gang's orders).

The Eleventh Circuit properly concluded that it was error to admit the evidence of racism at Mr. Bowman's trial. But it went on to apply the harmless error standard incorrectly, ignoring this Court's admonition that such error must be harmless "beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. Even a cursory look at this evidence shows that it must have tainted the jurors' view of Mr. Bowman and encouraged a guilty verdict based on his association with the Outlaws rather than on his allegedly wrongful conduct. This was not a case where the Government introduced relatively innocuous evidence such as of Mr. Bowman's support for a particular political party in the next presidential election or

his views on universal health care. Rather, the Government sought to introduce the most inflammatory evidence possible, evidence of Mr. Bowman's racism. Nor was this an accidental isolated remark. Rather it was a carefully calculated effort by the Government to inflame the jury's passions against Mr. Bowman. Indeed, the very fact that the Government sought to introduce the evidence of the Outlaws' racism so frequently and that it argued for its admission so vehemently underscores that the *Government* clearly did not think that this evidence was harmless, much less harmless beyond a reasonable doubt. To the contrary, the Government obviously viewed this evidence as crucial to its case against Mr. Bowman.

The cases in which the courts of appeals have reversed criminal convictions because of evidence admitted in error under Rule 403 form a relatively limited category. There is not a bright-line rule for when evidence is so inflammatory that its introduction requires reversal. But the examples are stark: the defendant condones child molestation or wife-beating, is a homosexual, enjoys deviant pornography or, most important, is a racist.

For example, in *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993), *cert. denied*, 516 U.S. 986 (1995), the Fourth Circuit addressed a case in which members of the Hare Krishna religion were charged under RICO and mail fraud statutes. The government introduced evidence that one of the defendants was a homosexual, that he compared women to dogs and condoned "lightly slapping" one's wife for disciplinary reasons, and that he was the leader of a Hare Krishna community that had molested children. *Id.* at 1251-52. The Fourth Circuit explained that this evidence created a "fear that jurors will convict a defendant based on the jurors' disdain or their belief that the defendant's prior bad acts make guilt more likely." *Id.* at 1252. The child molestation allegation was particularly inflammatory, and a curative

instruction by the court was insufficient to correct the error. *Id.* at 1253. Because the admission of this "inflammatory evidence so infected" the defendant's trial, the Fourth Circuit vacated their convictions and remanded for retrial. *Id.* at 1254.

Similarly, at least one circuit court has held that the improper admission of evidence of the defendant's racism, which was unrelated to the charged offenses, requires reversal. *See, e.g., United States v. Kallin*, 50 F.3d 689, 691 (9th Cir. 1995) (reversing in part because government had elicited testimony in a criminal tax evasion case that the defendant disliked Mexicans and the prejudicial effect of this evidence "far outweighed any probative value" under Rule 403); *see also United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993) (reversing conviction in child pornography case where government introduced evidence of adult pornography videotapes found in the defendant's house that depicted perverse sexual behavior including bestiality and sadomasochism because the material did not involve child pornography, "did not bear on any of the disputed trial issues" and bore a "substantial risk of inflaming the jury"); *United States v. Gillespie*, 852 F.2d 475, 478-79 (9th Cir. 1988) (reversing conviction for violation of federal statute prohibiting transportation of person in interstate commerce for illegal sexual purposes because the government introduced evidence of the defendant's homosexuality, and this evidence "neither proved nor disproved that the appellant molested the child" and was "extremely prejudicial").

Racism is a particularly offensive belief to most individuals. Indeed, evidence of an individual's racist views will have a "visceral impact that far exceeds [its] probative value." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). Given the evidence presented in Mr. Bowman's trial–including the Nazi-style tattoos, the whites-only policy and

the Nazi and Confederate flags – it "does not take much imagination to understand" how such "grossly biased" views would be viewed by the jury. *Kallin*, 50 F.3d at 696 n.7. The racial composition of the jury is irrelevant to this inquiry, because "nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them." *Id.* The "only purpose of this evidence would be to prejudice the jury against" Mr. Bowman, and this unfairly prejudicial result is exactly what Rule 403 intends to prevent. *Id.* The court below entirely ignored the cases that have held that admission of irrelevant evidence of particularly inflammatory beliefs – such as condoning wife beating, child molestation or racism – requires reversal. It is asking too much of a jury to ignore this evidence, and this error cannot be said to be harmless "beyond a reasonable doubt." If the Government thought this evidence was merely "harmless," it would not have introduced it so frequently.

Furthermore, the Government also injected into Mr. Bowman's trial racial issues where no racially-motivated crimes were charged. This Court has held that the Constitution "prohibits racially-biased prosecutorial arguments," *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987), and the federal courts have sought for years to eradicate the effect of racism in the justice system. As the Eleventh Circuit noted, the Government "should have scrupulously avoided the possibility that the jury's verdict might be clouded by racial issues," and the court could have "prevented the injection of racial issues simply by redacting the whites-only policy." *Bowman*, 302 F.3d at 1240.

The court below again ignored the precedent of this Court and the other federal courts that the deliberate injection of racial issues violates a defendant's constitutional right to a fair trial and requires reversal.

For example, in *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), the D.C. Circuit reversed the defendants' convictions of drug offenses because the Government introduced evidence through a police detective that Jamaicans conducted a substantial amount of the drug trade in the District of Columbia. Given the courts' "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *id.* at 21 (quoting *Batson v Kentucky*, 476 U.S. 79, 85 (1986)), "[a]ppeals to racial passion can distort the search for truth and drastically affect a juror's impartiality," *Id.* at 25. Because the prejudicial impact so outweighed any relevance of this testimony, the court held that it could not conclude beyond a reasonable doubt that the comments "did not contribute significantly to appellants' convictions" and reversed. *Id.* at 28.

Other courts have similarly reversed convictions where the Government injected racial prejudice into the proceedings rather than relying on relevant evidence. *See, e.g., United States v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000) (reversing convictions of Cuban defendants because police officer's testimony making generalizations about Cubans and the drug trade prejudiced the defendants and "made it seem more likely in the eyes of the jury" that they were drug dealers); *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994) (reversing convictions of Hmong defendants because Government introduced testimony about high likelihood of opium drug dealers being Hmong and this injection of racial prejudice "invited the jury" to use racial prejudice in their deliberations, thus violating the Fifth Amendment); *United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (reversing convictions because "[i]njection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration here").

The court below erred by holding that the district court's admission of irrelevant evidence relating to Mr. Bowman's racist views was harmless error. None of this evidence was relevant and all of it had a "visceral impact" on the jury against Mr. Bowman, thus infecting the entire trial. Given the serious risk that Mr. Bowman's conviction was a result not of the relevant evidence offered against him but rather of the jury's dislike of his personal beliefs, the court below should not have concluded that the error was harmless beyond a reasonable doubt and this Court should clarify the harmless error standard for these types of cases.

II. THE COURT BELOW IGNORED THIS COURT'S HOLDING IN *ARIZONA V. FULMINANTE* THAT ERROR WHICH TAINTS THE FRAMEWORK OF THE ENTIRE TRIAL IS STRUCTURAL ERROR NOT SUBJECT TO A HARMLESS ERROR ANALYSIS

The court below ignored this Court's holding in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), that where the error is a "structural error" that "affect[s] the framework within which the trial proceeds," the harmless error standard should not be applied. In *Chapman*, 386 U.S. at 827-28, this Court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." In *Fulminante*, this Court elaborated on these types of structural errors, holding that they are errors "affecting the framework within which the trial proceeds." 499 U.S. at 310.

The Eleventh Circuit analyzed this issue briefly under the harmless error standard, concluding that the admission of this evidence did not require reversal. *Bowman*, 302 F.3d at 1240. However, the court never even *considered* whether the error may have affected a fundamental trial right so that the harmless error standard was inapplicable and the *Fulminante* structural error standard was the correct method

of analysis. The court below thus ignored this Court's precedent in both *Chapman* and *Fulminante*, an indication of the confusion in the circuit courts over when to apply the structural error or harmless error standard.

There are two ways in which the admission of the whites-only policy was structural error. *First*, as at least one circuit court has held, the injection of racially-biased arguments by the Government constitutes structural error because it taints the entire trial. *Second*, Mr. Bowman was effectively denied the right to voir dire the venire about their ability to judge him fairly because he relied on the district court judge's pretrial ruling that the whites-only policy would not be part of the case.

A. The Government's Injection of Racial Prejudice Into the Trial was Structural Error

The United States Court of Appeals for the Fourth Circuit has held that the injection of a race-based argument by the Government is a structural error requiring reversal. *Miller v. North Carolina*, 583 F.2d 701, 706-07 (2d Cir. 1978). In *Miller*, the defendants were three African-American men accused of raping a white woman. The Government essentially argued that no white woman would ever consent to having intercourse with an African-American man. *Id.* at 704. The Fourth Circuit first noted that "[n]othing is more fundamental to the provision for a fair trial than the right to an impartial jury" and that "[t]he law guarantees that every defendant may have his case decided strictly according to the evidence presented, not by extraneous matters or by the predilections of individual jurors." *Id.* at 706. The federal rules of evidence seek to "restrict the deliberations of jurors to that which is trustworthy, probative and relevant." *Id.* The court went on to explain that a racially-based argument "poses a serious threat to a fair trial" and "undermine[s] a jury's impartiality."

Id. at 708. Analogizing this error to other structural errors under *Chapman* (such as a coerced confession), the Fourth Circuit concluded that this type of error is one to which "the harmless error rule does not apply" because the "prejudice engendered is so great that automatic reversal is required." *Id.*; *see also United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973) (stating that where a prosecutor's remarks "introduced race prejudice into the trial," the defendant is denied "his constitutional right under the due process clause to a fair trial" though not reaching harmless error issue because evidence against defendant was so weak); *Soap v. Carter*, 632 F.2d 872, 877 (10th Cir. 1980) (Seymour, J., dissenting) (suggesting that a "prosecutor's appeal to racial prejudice can rise to an infirmity of [such a] magnitude" that automatic reversal is required), *cert. denied*, 451 U.S. 439 (1981).

The introduction of race-based arguments into a trial in order to prejudice the jury against the defendant is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 309. The Government deliberately sought to inject Mr. Bowman's trial with an overlay of racial prejudice. This type of argument taints the jury's perception of Mr. Bowman and therefore the jury's verdict itself. This is the very definition of a structural error. It is not an error that can be weighed against the other evidence admitted against Mr. Bowman because it infected the framework of the trial. The Eleventh Circuit did not even consider this alternate avenue of analysis, suggesting that this case is a proper vehicle for this Court to amplify for the courts of appeals what is the standard of review when the Government introduces race-based arguments into a trial when such an argument is irrelevant to the charged offenses.

B. Mr. Bowman Did Not Conduct Voir Dire on Racial Prejudice Because He Believed the Whites-Only Policy Would Not Be an Issue in the Trial and This Was Structural Error

It was also structural error for the district court to have admitted the evidence of the Outlaws' racism because Mr. Bowman had relied on the district court's pretrial ruling that the whites-only policy was not going to be an issue in the trial and did not voir dire the venire on this issue. Therefore, the voir dire process was fundamentally unfair and infected the framework of the trial itself.

The right to voir dire the venire on areas of possible prejudice against the defendant is a key element for a fair trial. As this Court has held, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). This Court has also held that where racial prejudice could be an issue in a trial, due process requires that the defendant "be permitted to have the jurors interrogated on the issue of racial bias." *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). This Court in *Ham* reversed the defendant's conviction because he was not permitted to question the venire about racial prejudice and such prejudice was likely to be an issue during the trial. Id. at 529. Although the right to voir dire on racial prejudice is not absolute, if the issue will likely be raised during the trial, the Constitution requires "voir dire to include specific questioning about racial prejudice." *Ristiano v. Ross*, 424 U.S. 589, 595-96 (1976) (refusing to permit such questioning because defendant only argued that it be required because defendant was African American and victim was white).

In this case, the Eleventh Circuit ignored Mr. Bowman's argument that he had permitted an African American juror to be chosen for the jury because he had relied on the district

court judge's pretrial ruling that the whites-only policy would not be a part of the case. Br. of Appellant at 33. The situation in this case stands in marked contrast to that in the D.C. Circuit case discussed earlier, *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), in which the court reversed the defendants' sentences based on the racist testimony of a police officer. In that case, the court *had permitted* voir dire "for possible bias against Jamaicans." Id. at 18; *see also Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) (holding that racial discrimination during voir dire is a structural error not subject to harmless error analysis). Despite the permitted voir dire on racial prejudice, the D.C. Circuit held that the injection of racial comments tainted the jury and required reversal. The situation for Mr. Bowman was substantially worse than for the defendants in *Doe* as he did not have the opportunity to question the venire about racial prejudice. Mr. Bowman was essentially denied the opportunity to voir dire the jurors about their potential biases concerning racist views. Therefore, although "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors," *Morgan*, 504 U.S. at 729, Mr. Bowman was effectively denied this right.

CONCLUSION

This case presents the important issue of how race-based evidentiary issues fit into this Court's harmless error framework. Mr. Bowman was denied a fair trial because the district court admitted the evidence of the Outlaws' whites-only policy. This evidence had no relevance to the charges against him because the Government did not charge him with any racially-motivated crimes. Evidence of a *defendant's* racism endangers the impartiality of the jury and taints its verdict, but the court below ignored relevant precedent and treated the evidence of racism as though it were any other type of irrelevant evidence rather than as the purely

inflammatory evidence that it was. Given the danger that the factfinder was not impartial, the admission of this evidence cannot be seen to be mere harmless error. Additionally, the court below failed to consider the possibility that this error was *structural*, placing it in a limited category of cases requiring automatic reversal. The Eleventh Circuit's blatant disregard of this alternate standard of review indicates confusion in the federal courts about *Arizona v. Fulminante*, confusion that a decision by this Court in the present case would eliminate.

Respectfully submitted,

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